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07 UNITED STATES DISTRICT COURT
08 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

09 SUSAN HARRINGTON,

10 Plaintiff,

11 v.

12 MICHAEL J. ASTRUE, Commissioner,
Social Security Administration,

13 Defendant.
14

)
) Case No. 06-1396-MJP-JPD
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) REPORT AND RECOMMENDATION
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15 Plaintiff Susan Harrington appeals the final decision of the Commissioner of the Social
16 Security Administration (“Commissioner”) which denied her applications for Disability
17 Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and
18 XVI of the Social Security Act, 42 U.S.C. §§ 401 *et seq.*, and 1381 *et seq.*, after a hearing
19 before an administrative law judge (“ALJ”). For the reasons set forth below, the Court
20 recommends that the Commissioner’s decision be REVERSED and REMANDED for an
21 award of benefits.

22 I. FACTS AND PROCEDURAL HISTORY

23 Plaintiff is a forty-six year-old woman with a GED and some post-high school
24 education. Administrative Record (“AR”) at 64, 69, 87. Her past work experience includes
25 employment as an accounts supervisor, accounts administrator, accounts payable staff person,
26 and office manager. AR at 17. She suffers from piriformis syndrome and chronic pain

01 syndrome. AR at 18. She has an alleged onset date of May 19, 2001. AR at 69.

02 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 16.
03 On December 6, 2004, a disability hearing was held before the ALJ, who eventually concluded
04 that plaintiff was not disabled and denied benefits based on his finding that plaintiff could
05 perform her past relevant work. AR at 340-72, 29. Plaintiff's administrative appeal of the
06 ALJ's decision was denied by the Appeals Council, AR at 5-7, making the ALJ's ruling the
07 "final decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). Plaintiff
08 timely filed the present action challenging the Commissioner's decision. Dkt. No. 3.

09 II. JURISDICTION

10 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§
11 405(g) and 1383(c)(3).

12 III. STANDARD OF REVIEW

13 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
14 social security benefits when the ALJ's findings are based on legal error or not supported by
15 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
16 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is
17 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
18 *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750
19 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in
20 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,
21 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a
22 whole, it may neither reweigh the evidence nor substitute its judgment for that of the
23 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence
24 is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that
25 must be upheld. *Id.*

26 If this Court determines that the ALJ committed reversible error, it has the discretion

01 to remand for further proceedings or to award benefits. *McCartey v. Massanari*, 298 F.3d
02 1072, 1076 (9th Cir. 2002). Remand for further proceedings is appropriate where additional
03 proceedings would remedy defects in the ALJ's decision, *Rodriguez v. Bowen*, 876 F.2d 759,
04 763 (9th Cir. 1989), and where the Commissioner is in a better position to evaluate the
05 evidence. *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). Remand for an award of
06 benefits is preferred where "the record has been fully developed and further administrative
07 proceedings would serve no useful purpose." *McCartey*, 298 F.3d. at 1076. More specifically,
08 erroneously rejected evidence should be credited and an immediate award of benefits directed
09 where:

10 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [certain
11 pertinent] evidence, (2) there are no outstanding issues that must be resolved
12 before a determination of disability can be made, and (3) it is clear from the
record that the ALJ would be required to find the claimant disabled were such
evidence credited.

13 *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996); *see also Harman v. Apfel*, 211 F.3d
14 1172, 1178 (9th Cir. 2000) (noting that erroneously rejected evidence may be credited when
15 all three elements are met).

16 IV. EVALUATING DISABILITY

17 As the claimant, Ms. Harrington bears the burden of proving that she is disabled within
18 the meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113
19 (9th Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to
20 engage in any substantial gainful activity" due to a physical or mental impairment which has
21 lasted, or is expected to last, for a continuous period of not less than twelve months. 42
22 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her
23 impairments are of such severity that she is unable to do her previous work, and cannot,
24 considering her age, education, and work experience, engage in any other substantial gainful
25 activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *see*
26 *also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

01 The Commissioner has established a five step sequential evaluation process for
02 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
03 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At
04 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at
05 any step in the sequence, the inquiry ends without the need to consider subsequent steps.
06 Step one asks whether the claimant is presently engaged in “substantial gainful activity.” 20
07 C.F.R. §§ 404.1520(b), 416.920(b).¹ If she is, disability benefits are denied. If she is not, the
08 Commissioner proceeds to step two. At step two, the claimant must establish that she has one
09 or more medically severe impairments, or combination of impairments, that limit her physical
10 or mental ability to do basic work activities. If the claimant does not have such impairments,
11 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
12 impairment, the Commissioner moves to step three to determine whether the impairment
13 meets or equals any of the listed impairments described in the regulations. 20 C.F.R. §§
14 404.1520(d), 416.920(d). A claimant whose impairment meets or equals one of the listings for
15 the required twelve-month duration requirement is disabled. *Id.*

16 When the claimant’s impairment neither meets nor equals one of the impairments listed
17 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s
18 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
19 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work
20 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f).
21 If the claimant is able to perform her past relevant work, she is not disabled; if the opposite is
22 true, then the burden shifts to the Commissioner at step five to show that the claimant can
23 perform other work that exists in significant numbers in the national economy, taking into
24 consideration the claimant’s RFC, age, education, and work experience. 20 C.F.R. §§
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26 ¹ Substantial gainful activity is work activity that is both substantial, i.e., involves significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. § 404.1572.

01 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the
02 claimant is unable to perform other work, then the claimant is found disabled and benefits may
03 be awarded.

04 V. DECISION BELOW

05 On April 28, 2005, the ALJ issued a decision finding:

- 06 1. The claimant meets the nondisability requirements for a Period of
07 Disability and Disability Insurance Benefits set forth in Section 216(i) of
08 the Social Security Act and is insured for benefits through
09 December 31, 2006.
- 10 2. The claimant has not engaged in substantial gainful activity since the
11 alleged onset of disability.
- 12 3. The claimant's piriformis syndrome and chronic pain syndrome are
13 considered "severe" based on the requirements in the Regulations at 20
14 C.F.R. §§ 404.1520(c) and 416.920(c).
- 15 4. These medically determinable impairments do not meet or medically
16 equal any of the listed impairments in 20 C.F.R., Appendix 1 to Subpart
17 P of Part 404.
- 18 5. The undersigned finds the claimant's allegations regarding her
19 limitations are not totally credible for the reasons set forth in the body
20 of the decision.
- 21 6. The claimant has the following residual functional capacity. She can
22 occasionally lift 20 pounds, frequently lift ten pounds, stand and/or
23 walk for six hours in an eight-hour workday with a sit/stand option, sit
24 for two hours in an eight-hour workday with a sit/stand option, and do
25 unlimited pushing and pulling. She cannot climb ladders, ropes, or
26 scaffolds. She can occasionally balance. She must avoid hazards such
as heights.
7. The claimant's past relevant work did not require the performance of
work-related activities precluded by her residual functional capacity (20
C.F.R. §§ 404.1565 and 416.965).
8. The claimant's medically determinable piriformis syndrome and chronic
pain syndrome do not prevent the claimant from performing her past
relevant work.
9. The claimant was not under a "disability" as defined in the Social
Security Act, at any time through the date of the decision (20 C.F.R. §§
404.1520(f) and 416.920(f)).

AR at 28-29.

01 VI. ISSUES ON APPEAL

02 There remain two principal issues on appeal:

- 03 1. Did the ALJ err in rejecting plaintiff's testimony and finding her not
04 credible?
- 05 2. Did the ALJ err in his assessment of the medical evidence, and
06 particularly, the opinion of treating physician David Jackson, M.D.?

06 Dkt. No. 12 at 1.

07 VII. DISCUSSION

08 A. The ALJ Erred in His Assessment of the Plaintiff's Testimony and Credibility

09 As noted above, it is the responsibility of the ALJ to determine credibility, to settle
10 conflicts in medical testimony, and to resolve any other ambiguities that might exist. *Andrews*,
11 53 F.3d at 1039. However, once a claimant produces medical evidence of an underlying
12 impairment, the ALJ may not discredit the claimant's testimony as to the severity of symptoms
13 solely because they are unsupported by objective medical evidence. *Reddick*, 157 F.3d at 722
14 (citations omitted). Absent affirmative evidence showing that the claimant is malingering, the
15 ALJ must provide clear and convincing reasons, supported by substantial evidence, for
16 rejecting the claimant's testimony. *Id.* "General findings are insufficient; rather, the ALJ must
17 identify what testimony is not credible and what evidence undermines the claimant's
18 complaints." *Id.*² Here, there is no evidence that the plaintiff was malingering.
19 Consequently, the ALJ was required to provide clear and convincing reasons to reject the
20 claimant's testimony.

21 The plaintiff testified that she suffered from, *inter alia*, what has been diagnosed as
22 piriformis syndrome. This is a rare and little understood medical condition caused by very

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24 ³ The ALJ may consider ordinary techniques of credibility evaluation, including a
25 reputation for truthfulness, inconsistencies in testimony, or between testimony and conduct,
26 daily activities, work record, and testimony from physicians and third parties concerning the
nature, severity, and effect of the symptoms of which the claimant complains. *Light v. Social*
Sec. Admin., 119 F.3d 789, 792 (9th Cir. 1997) (citations omitted); *Smolen*, 80 F.3d at 1284.

01 tight muscle constriction in the buttocks region which places undue pressure on the sciatic
02 nerve, causing chronic pain. AR at 335-38. Although this condition is little understood, the
03 Medical Expert (“ME”) in this case testified that the plaintiff’s piriformis syndrome “is well-
04 described.” AR at 364. He stated that the syndrome produces symptoms similar to those
05 complained of by the plaintiff, but is not something that can be visualized by imaging. AR at
06 365-66. The ME also testified that the subjective symptoms as described by the plaintiff were
07 reasonable and credible as associated with the syndrome, but added that he was unable to
08 evaluate the intensity of the symptoms on the plaintiff. AR at 366.

09 The ALJ found the plaintiff to be less than credible. AR at 28-29. To support this
10 finding, the ALJ cited: (1) the lack of objective medical evidence; (2) inconsistencies
11 regarding the extent of prior earnings; (3) daily activities; (4) failure to seek emergency care;
12 and (5) failure to follow treatment. None of these purported bases constitute clear and
13 convincing reasons supported by substantial evidence to reject the plaintiff’s testimony.

14 1. *Lack of Objective Medical Evidence*

15 As discussed above, piriformis syndrome is characterized as not susceptible of being
16 imaged. AR at 366. The condition is “diagnosed primarily on the basis of symptoms and on
17 the physical exam. There are no tests that accurately confirm the diagnosis, but X-rays, MRI
18 and nerve conduction tests may be necessary to exclude other diseases.” AR at 335. The ME
19 confirmed that the plaintiff’s symptoms were consistent with a diagnosis of piriformis
20 syndrome. This was also the diagnosis of the plaintiff’s treating physicians. Nevertheless, the
21 ALJ’s opinion is replete with the theme that the lack of objective medical evidence doomed
22 plaintiff’s credibility. “[C]laimant complains of severe back pain without any objective
23 findings” (AR at 18); “claimant’s MRI was unremarkable” (AR at 18); “[t]he undersigned
24 notes the lack of objective findings” (AR at 19); “[t]he undersigned notes that claimant’s
25 symptoms did not correspond with objective findings” (AR at 20); “[a] CT scan of claimant’s
26 pelvis on that date was normal.” (AR at 23).

01 The ALJ made an adverse credibility determination based in part on the lack of
02 objective medical evidence for a condition that is characterized as having little, if any,
03 objective evidence. This does not provide a clear and convincing reason supported by
04 substantial evidence to reject the plaintiff's testimony. *See Reddick*, 157 F.3d at 722.

05 2. *Inconsistency Regarding Extent of Claimant's Prior Earnings*

06 In an attempt to disparage the plaintiff's credibility, the ALJ noted that the plaintiff
07 testified that she had an income of \$44,000 before her onset, and dropped to an income of
08 \$339 per month in state assistance. AR at 356. However, her earnings record showed that
09 her highest salary was \$36,495. AR at 25. The Commissioner argues that this fact constitutes
10 a basis for the Court to affirm the ALJ's adverse credibility determination. Dkt. No. 13 at 10.

11 Inconsistencies or inaccuracies in testimony can form the basis for an adverse
12 credibility determination. *Moncada v. Chater*, 60 F.3d 521, 524 (9th Cir. 1995). However,
13 the inaccuracies must constitute clear and convincing reasons to reject the proffered testimony
14 or the claimant's overall credibility. *Id.*; *Smolen*, 80 F.3d at 1284. Variances of income
15 estimates received during a period of 1997 through 2001 given at a hearing that took place in
16 late 2004, without the benefit of records, hardly qualify as material inconsistencies sufficient to
17 produce the clear and convincing reasons required under governing law. *Light*, 119 F.3d at
18 792 (citations omitted); *Smolen*, 80 F.3d at 1284. There is no relationship between this
19 inconsistency or inaccuracy and the testimony offered by the plaintiff. Accordingly, this
20 inconsistency, standing alone, does not provide a clear and convincing reason supported by
21 substantial evidence to reject plaintiff's testimony or her overall credibility.

22 3. *Daily Activities*

23 In his opinion, the ALJ held that the plaintiff's daily activities were not consistent with
24 the pain she testified experiencing and that such activities were consistent with a finding of
25 nondisability. AR at 27. Specifically, the ALJ cited to the fact that the plaintiff attended
26 church, visited with her mother, and took her niece and nephew to soccer practices. AR at 27.

01 He also pointed out that the plaintiff was able to prepare her own meals, wash dishes, oil paint,
02 grocery shop, and that she made a trip to Lake Chelan, which involved a four-hour car ride.
03 AR at 27.

04 In *Orn v. Astrue*, ___ F.3d ___, 2007 WL 2034287 (9th Cir. July 16, 2007), the Ninth
05 Circuit reaffirmed the principle that a claimant's ability to carry on certain daily activities does
06 not in any way detract from a claimant's credibility. *Id.* at *12 (quoting *Vertigan v. Halter*,
07 260 F.3d 1044, 1050 (9th Cir. 2001) ("This court has repeatedly asserted that the mere fact
08 that a plaintiff has carried on certain daily activities, such as grocery shopping, driving a car, or
09 limited walking for exercise, does not in any way detract from her credibility as to her overall
10 disability.")). Instead, daily activities can form a ground for an adverse credibility
11 determination only "if the claimant is able to spend a *substantial* part of her day performing
12 household chores or other activities that are transferable to a work setting." *Smolen*, 80 F.3d
13 at 1284 (emphasis added); *see also Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) ("The
14 Social Security Act does not require that claimants be utterly incapacitated to be eligible for
15 benefits, and many home activities are not easily transferable to what may be the more grueling
16 environment of the workplace, where it might be impossible to periodically rest or take
17 medication." (citations omitted)). Here, the ALJ failed show how any of the alleged activities
18 were transferrable to a potential work setting.

19 Moreover, the ALJ failed to note the consequences of some of the activities he cited.
20 For example, the claimant did, indeed, travel with others to Lake Chelan. However, the ALJ
21 failed to note that the plaintiff traveled as a passenger in a reclined position, and then suffered
22 several days for doing so. AR at 354-55, 254, 288. Similarly, when plaintiff drove her
23 nephew to a soccer practice, she would often lie down in her car or go home. AR at 360.
24 When she attended church services, she stood in the back, instead of sitting down. AR at 346.
25 Afterwards, she was required to lie down to compensate. AR at 346, 356-57. The mere fact
26 that plaintiff could sporadically perform some of these activities does not signify that she is

01 capable of continuously and consistently performing in a structured work environment. *See* 20
02 C.F.R. § 404, Subpt. P., App. 2, § 200.00(c) (defining RFC as “the maximum degree to which
03 the individual retains the capacity for *sustained* [work].”) (emphasis added); *Burch*, 400 F.3d
04 676, 681 (9th Cir. 2005) (stating that adverse credibility finding based on activities may be
05 proper “if a claimant engages in numerous daily activities involving skills that could be
06 transferred to the workplace”).

07 The ALJ also failed to note that in many of her doctors’ reports, the physicians noted
08 that the plaintiff stood or curled up during the medical examinations. *See, e.g.*, AR at 287,
09 288, 290, 300. This was due to the fact that sitting was too painful for her.

10 There is nothing in the plaintiff’s daily activities, when properly analyzed as to how
11 they were performed and the resulting pain, that supports a finding that plaintiff is able to
12 spend a substantial part of her day engaged in pursuits involving the performance of physical
13 functions that are transferrable to a work setting.

14 4. *Failure to Seek Emergency Care*

15 The ALJ also believed a person in the position of the plaintiff would have many more
16 trips for emergency care than the plaintiff’s medical history demonstrates. However, the ALJ
17 asked the plaintiff no questions regarding the absence of emergency visits. Rampant
18 speculation cannot serve as a substitute for substantial evidence. In this case, the plaintiff is
19 suffering from a chronic condition. She testified that she copes by lying down much of the
20 time, and has difficulty sitting or standing for any lengthy period. Moreover, she apparently
21 takes morphine three times a day to cope with the pain she is suffering. She has found
22 alternatives to emergency care, and given her indigent position, finding alternatives should
23 come as no surprise. *See Smolen*, 80 F.3d at 1284 (inability to afford treatment due to
24 unemployment or lack of insurance constitutes a “good reason” for not seeking additional
25 treatment, and a claimant’s “symptom testimony cannot be rejected for not doing so”). An
26 adverse credibility finding cannot be sustained by the ALJ’s speculation.

01 5. *Failure to Follow Treatment*

02 The final justification for the ALJ's adverse credibility determination is that the plaintiff
03 allegedly failed to follow prescribed treatment. The Commissioner contends that the plaintiff
04 (a) insisted on obtaining a steady supply of narcotic pain medications and did not taper them
05 despite Dr. Jackson's recommendation to lessen the possibility of narcotics tolerance; (b)
06 avoided physical therapy; and (c) did not follow up on Swedish Hospital's recommendation
07 for another pain clinic. Dkt. No. 13 at 11-12.

08 The failure to taper use of pain medication, prescribed by a physician, can hardly be
09 said to be inconsistent with claims of pain. It may have been unwise for the plaintiff to have
10 not shifted from prescription pain remedies to lessen the possibility of narcotics tolerance, but
11 that has no bearing on the plaintiff's credibility as to pain she is sustaining. Moreover, this was
12 not explicitly cited by the ALJ as a basis for his adverse credibility determination.

13 As to the alleged avoidance of physical therapy, the record proves just the opposite.
14 The plaintiff attended twelve out of twelve physical therapy visits and experienced some
15 improvement. Unfortunately, she used her maximum DSHS insurance benefits, and had no
16 ability to pay for further treatment. AR at 242, 254. Her inability to pay, however, cannot be
17 used as a means to draw adverse credibility determinations against the plaintiff when she
18 sought treatment when she could afford it, but did not when she could not afford to do so.
19 *Orn*, ___ F.3d at ___, 2007 WL 2034287 at *12; *Smolen*, 80 F.3d at 1284.

20 The ALJ claims that the plaintiff "failed" the pain clinic at Swedish Hospital. AR at 27.
21 The Commissioner, citing the record in support of the ALJ (AR at 142-44), maintains the
22 same. Dkt. No. 13 at 11-12. A review of the record does not reveal what "failing" the pain
23 clinic means; nor does it reveal anything consistent with a possible "failure." To the extent
24 that the ALJ believed that she lacked credibility because she did not consult a pain
25 psychologist, the ALJ failed to note that the plaintiff was not opposed to seeing a pain
26 psychologist, but had no insurance coverage to pursue this option. AR at 183. As noted

01 above, the inability to pay in this case cannot form the basis of an adverse credibility
02 assessment under *Orn.* See also *Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995)
03 (“Disability benefits may not be denied because of the claimant’s failure to obtain treatment he
04 cannot obtain for lack of funds.”).

05 Finally, the Court cannot overlook the witness testimony offered by the plaintiff’s
06 mother. She appeared at the hearing and was ready to testify. However, the ALJ refused to
07 listen to her testimony and instead insisted that it be submitted in writing after the hearing. AR
08 at 363. The plaintiff did so. See AR at 129. The written witness statement offers compelling
09 corroboration of the impact of the plaintiff’s condition. The plaintiff is driven by her mother to
10 her medical appointments because she cannot sit to drive. She was unable to attend her son’s
11 high school and fire-fighting academy graduations because she cannot sit for extended periods.
12 She was unable to attend her son’s basic training graduation in San Antonio, Texas, because
13 she cannot sit on an airplane for an extended period. She eats and pays her bills lying down or
14 standing. *Id.* The ALJ said he gave “some weight” to her mother’s statement, but noted that
15 it also shows that the plaintiff participates in some activities that she said she did not. This,
16 once again, falls short of the ALJ’s obligations in assessing credibility. He did not state what
17 was believable and what was not believable, as required by law. *Smolen*, 80 F.3d at 1284;
18 *Reddick*, 157 F.3d at 722.

19 Lay witness testimony as to a claimant’s symptoms or how an impairment affects the
20 ability to work is competent evidence that cannot be disregarded without discussing the
21 reasons therefore and making express credibility findings. *Nguyen v. Chater*, 100 F.3d 1462,
22 1467 (9th Cir. 1996); *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987). Because the
23 ALJ refused to take the testimony as proffered, he was not in a position to assess the
24 credibility of the plaintiff’s mother. As such, even though he did not totally discredit the
25 mother’s testimony, he is in no better position to assess credibility as far as the mother is
26 concerned than this Court is. Missing the family activities mentioned above constitutes

01 powerful corroborating evidence of the extent of the pain felt by the plaintiff when she sits,
02 and probative evidence of her overall credibility.

03 The ALJ is responsible for making credibility determinations, and this Court is not
04 authorized to substitute its judgment for that of the ALJ. *Thomas*, 278 F.3d at 954.
05 However, that power is not unfettered. Absent affirmative evidence showing that the claimant
06 is malingering, the ALJ must provide clear and convincing reasons, supported by substantial
07 evidence, for rejecting the claimant's testimony. *Reddick*, 157 F.3d at 722. The ALJ failed to
08 do so.

09 B. The ALJ Erred in His Evaluation of the Medical Evidence

10 The plaintiff also claims that the ALJ erred in his evaluation of the medical evidence.
11 Dr. Jackson has been a primary treating physician for the plaintiff since 1998. AR at 297. In
12 December 2004, he opined:

13 I feel strongly that she is completely disabled. She cannot tolerate sitting for
14 more than ten minutes at a time. She can much better tolerate standing, but
15 standing in one place would be limited to four hours per day. Lifting is limited
16 to a maximum of twenty pounds occasionally, and a maximum of five pounds
17 frequently. Squatting or kneeling, bending or stooping, crawling or climbing
18 could be done only rarely. Fine manipulation or reaching overhead would not
19 be a problem. Operating hand controls would not be a problem either.

17 I have not seen any significant improvements nor significant worsening in the
18 patient's condition in the last four years. I don't except [*sic*] any significant
19 change in the future.

19 AR at 298.

20 In his opinion, the ALJ claimed he gave Dr. Jackson's opinion "significant" weight,
21 with only "slight modifications." AR at 27. He found no basis in the record for restrictions on
22 lifting limited to twenty pounds and frequently lifting ten pounds.³ He also stated there was no
23 basis for bending, squatting or stooping restrictions. *Id.* Although he professed that he gave
24 Dr. Jackson's opinion significant weight with only "slight modifications," he did not address,

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26 ³ If the plaintiff can lift only five pounds frequently as Dr. Jackson stated rather than ten
pounds as the ALJ determined, the plaintiff is unable to perform "light" work under the
Regulations. See 20 C.F.R. §§ 404.1567, 416.967.

01 either positively or negatively, Dr. Jackson's limitations of sitting no more than ten minutes at
02 a time or restrictions on standing in the same place for no more than four hours. In his RFC,
03 the ALJ determined that the plaintiff can

04 occasionally lift 20 pounds, frequently lift ten pounds, stand and/or walk for six
05 hours in an eight-hour workday with a sit/stand option, sit for two hours in an
06 eight-hour workday with a sit/stand option, and can do unlimited pushing and
pulling. She cannot climb ladders, ropes of scaffolds. She can occasionally
balance. She must avoid hazards such as heights.

07 AR at 29.

08 To support his findings, the ALJ placed "significant weight" on a state agency physical
09 RFC assessment. AR at 22. It was approved by non-examining physician Harold Meyer,
10 M.D. AR at 236-41. The ALJ adopted the report, stating it was consistent with the bulk of
11 the evidence of record, but that the record did not support stooping and crouching restrictions
12 contained in the assessment. AR at 22. The underlying report concluded that the plaintiff
13 could sit six hours in an eight-hour workday as long as she periodically shifted between
14 standing and sitting on an every two-hour basis. AR at 237-38. The doctor noted "Clmt's
15 etiology of pain has not been determined as all testing, including an MRI, CT of the pelvis,
16 EMG injections, and a discogram have been relatively benign or nonspecific in identifying the
17 generator of her pain." AR at 237. It is apparent that the state agency reviewing doctor was
18 persuaded by the absence of objective symptoms. As discussed above, this cannot constitute
19 substantial evidence, particularly when the impairment is characterized by a lack of objective
20 symptoms. Moreover, the report's statement that the plaintiff could sit for six hours in an
21 eight-hour workday, as long as she alternated between sitting and standing every two hours,
22 was so inconsistent with the plaintiff's actual limitations that it was not adopted by the ALJ.
23 Nevertheless, the ALJ decided to give it "significant weight." AR at 22.

24 In *Orn*, the Ninth Circuit reiterated the significance of treating physicians' reports and
25 the weight they are to be given. *Orn*, ___ F.3d at ___, 2007 WL 2034287 at *4-5. By rule,
26

01 the Commissioner favors the opinion of a treating physician over non-treating physicians. *Id.*
02 at *4 (citing 20 C.F.R. § 404.1527). If a treating physician's opinion is not accorded
03 "controlling weight" because it is not "well-supported" or because it is inconsistent with other
04 substantial evidence in the record, the Commissioner considers specified factors in determining
05 the weight it will be given. *Id.* "Those factors include the '[l]ength of treatment relationship
06 and frequency of examination' by the treating physician; and the 'nature and extent of the
07 treatment relationship' between the patient and the treating physician." *Id.* (quoting 20 C.F.R.
08 § 404.1527(d)(2)(i)-(ii)). "Generally, the opinions of examining physicians are afforded more
09 weight than those of non-examining physicians, and the opinions of examining non-treating
10 physicians are afforded less weight than those of treating physicians." *Id.*

11 Dr. Jackson has been treating the plaintiff since 1998. AR at 297. In this case, the
12 ALJ stated he gave Dr. Jackson's RFC assessment "significant weight, with only slight or
13 adjustments." AR at 27. He did not. He also claimed his RFC assessment (of light work)
14 corresponded to Dr. Jackson's opinion. *Id.* As discussed above, it did not. The ALJ failed to
15 properly evaluate the medical evidence and, most particularly, that of Dr. Jackson. This error
16 was compounded by the ALJ's decision to give a non-reviewing physician's opinion the same
17 "significant weight," when it was clearly inconsistent with Dr. Jackson's opinion, and when the
18 non-treating physician's opinion was premised on lack of objective findings in a case involving
19 piriformis syndrome.

20 C. This Matter Should Be Remanded For the Award of Benefits

21 The ALJ found that with this RFC, the plaintiff could engage in her past relevant work
22 as an accounts supervisor, which is light work with an SVP level of 6; an accounts
23 administrator, which is sedentary work with an SVP of 6; or an office manager, which is
24 sedentary work with an SVP of 8. AR at 28. The ALJ based this finding on the testimony of
25 a Vocational Expert ("VE") to whom he gave great weight, because the VE "had the unique
26 opportunity to review the entire file." AR at 28. The VE also testified that if the plaintiff's

01 testimony was fully credible, there would be no jobs for the plaintiff in the national economy.
02 AR at 368. As discussed above, the ALJ erred in his adverse credibility determination.
03 Accordingly, disability benefits are properly awarded.


04 Moreover, after the VE testified that the plaintiff could do her previous jobs, he was
05 asked on cross-examination what he understood the ALJ was asking regarding limitations on
06 sitting and standing. The VE testified that when he answered the question, he believed the
07 ALJ was posing a hypothetical wherein the plaintiff would be able to stand not more than two
08 hours in an eight hour work day. AR at 369. After being corrected, he changed his testimony
09 to signify sitting for not more than two hours in an eight hour day. When asked about the
10 impact of maximum length of time for sitting before standing, he testified that changing
11 positions every thirty seconds or so would not be reasonable, but that changes every fifteen
12 minutes would be. AR at 379-80. When asked if the worker required periodic thirty-minute
13 periods to lie down, the VE said this would preclude the hypothetical claimant's prior work.
14 AR at 371.

15 In this case, "the record has been fully developed and further administrative
16 proceedings would serve no useful purpose." *McCartey*, 298 F.3d at 1076. Furthermore, the
17 evidence of record would require the ALJ to find the plaintiff disabled during the relevant
18 period. Under these circumstances, and in light of the length of time between the plaintiff's
19 application and the present, this matter should be remanded with a direction for the award of
20 benefits.

21 VIII. CONCLUSION

22 For the foregoing reasons, the Court recommends that this case be REVERSED and
23 REMANDED for an award of benefits. A proposed order accompanies this Report and
24 Recommendation.

01 DATED this 21st day of August, 2007.

02 
03 JAMES P. DONOHUE
04 United States Magistrate Judge
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